A

KARPAL SINGH RAM SINGH

v.

KETUA HAKIM NEGARA

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-13-2011]
1 MARCH 2011

C ***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Mandamus - Complaint by applicant against Chief Justice of Malaysia (respondent) - Locus standi of applicant - Whether applicant failed to show he fell within ambit of s. 44(1)(a) Specific Relief Act 1950 - Whether applicant's personal rights injured if respondent did not perform*
D *statutory duties - Absence of any imperative legal duty on respondent to act in manner dictated by applicant - Whether applicant failed to satisfy s. 44(1)(b) of same Act - Whether application frivolous and vexatious - Specific Relief Act 1950, s. 44(1)(a), (b) - Judges' Code of Ethics 2009, ss. 12, 13*

E ***ADMINISTRATIVE LAW:*** *Remedies - Mandamus - Application for leave - Complaint by applicant against Chief Justice of Malaysia (respondent) - Locus standi of applicant - Whether applicant failed to show he fell within ambit of s. 44(1)(a) Specific Relief Act 1950 -*
F *Whether applicant's personal rights injured if respondent did not perform statutory duties - Absence of any imperative legal duty on respondent to act in manner dictated by applicant - Whether applicant failed to satisfy s. 44(1)(b) of same Act - Whether application frivolous and vexatious - Specific Relief Act 1950, s. 44(1)(a), (b) - Judges' Code of Ethics 2009, ss. 12, 13*

G ***CIVIL PROCEDURE:*** *Judge - Chief Justice - Mandamus - Complaint by applicant against Chief Justice of Malaysia (respondent) - Locus standi of applicant - Whether applicant failed to show he fell within ambit of s. 44(1)(a) Specific Relief Act 1950 - Whether*
H *applicant's personal rights injured if respondent did not perform statutory duties - Absence of any imperative legal duty on respondent to act in manner dictated by applicant - Whether applicant failed to satisfy s. 44(1)(b) of same Act - Whether application frivolous and vexatious - Specific Relief Act 1950, s. 44(1)(a), (b) - Judges' Code of Ethics 2009,*
I *ss. 12, 13*

PUBLIC AUTHORITIES: *Remedies - Judicial review - Mandamus - Complaint by applicant against Chief Justice of Malaysia (respondent) - Locus standi of applicant - Whether applicant failed to show he fell within ambit of s. 44(1)(a) Specific Relief Act 1950 - Whether applicant's personal rights injured if respondent did not perform statutory duties - Absence of any imperative legal duty on respondent to act in manner dictated by applicant - Whether applicant failed to satisfy s. 44(1)(b) of same Act - Whether application frivolous and vexatious - Specific Relief Act 1950, s. 44(1)(a), (b) - Judges' Code of Ethics 2009, ss. 12, 13*

PUBLIC SERVANTS: *Civil proceedings - Mandamus - Complaint by applicant against Chief Justice of Malaysia (respondent) - Locus standi of applicant - Whether applicant failed to show he fell within ambit of s. 44(1)(a) Specific Relief Act 1950 - Whether applicant's personal rights injured if respondent did not perform statutory duties - Absence of any imperative legal duty on respondent to act in manner dictated by applicant - Whether applicant failed to satisfy s. 44(1)(b) of same Act - Whether application frivolous and vexatious - Specific Relief Act 1950, s. 44(1)(a), (b) - Judges' Code of Ethics 2009, ss. 12, 13*

This was an application by the applicant, a Member of Parliament and an advocate and solicitor, seeking leave for judicial review under O. 53 of the Rules of the High Court 1980. The applicant applied, *inter alia*, for an order of *mandamus* to issue against the respondent, the Chief Justice of Malaysia, directing the respondent to respond to the applicant's request *vide* letter dated 1 December 2010 ('said letter'), that the respondent recuse himself from determining the merits of a complaint by the applicant against the respondent under s. 13 of the Judges' Code of Ethics 2009 ('Code'). It was the applicant's contention that under s. 13 of the Code, the respondent acts in his capacity as a public authority required by law to process and reply to a complaint made against any judge, including the Chief Justice of Malaysia. The applicant submitted that the respondent, by not responding to the said letter, had failed to carry out his duty and obligation under s. 13 of the Code. The Attorney General objected to the application for leave on, *inter alia*, the following grounds: (i) the applicant had failed to show that he fell within the ambit of s. 44(1)(a) of the Specific Relief Act 1950 ('SRA') in order to pass the threshold issue of *locus standi*. There was nothing in the applicant's affidavit that unequivocally stated he had a clear and specific legal right to

A the relief sought, and that his rights would be injured if the respondent did not perform his statutory duties; and (ii) ss. 12 and 13 of the Code do not impose a legal duty on the respondent to act in the manner dictated by the applicant.

B **Held (allowing the Attorney General's objection; dismissing the application for leave with costs):**

(1) The right to lodge a complaint under s. 12 of the Code and the right to obtain an order of *mandamus* as prayed for by the applicant ought to be distinguished as they are not C synonymous. Although the applicant has a right as a citizen, a Member of Parliament and an advocate and solicitor to lodge a complaint under s. 12 of the Code, this alone does not *ipso facto* confer him with the *locus standi* to obtain the relief prayed for unless he satisfies the requirements of s. 44(1) of the SRA. D Insofar as the application for *mandamus* against the respondent was concerned, the applicant must satisfy all of the five conditions under s. 44(1) of the SRA. *Koon Hoi Chow v. Pretam Singh* (foll). (para 10)

E **(2)** The applicant had not stated anywhere in his supporting affidavit that his personal rights would be injured if the respondent did not perform his statutory duties, thus failing to satisfy the requirements of s. 44(1)(a) of the SRA. Furthermore, the Code does not provide for a method in F dealing with a situation where a complaint is made against the Chief Justice and, likewise, ss. 12 and 13 of the Code do not impose a legal duty on the respondent to act in the manner dictated by the applicant. Therefore, in the absence of any legal duty which is imperative, and not optional or G discretionary, in nature imposed upon the respondent under ss. 12 and 13 of the Code, the applicant had failed to satisfy the condition under s. 44(1)(b) of the SRA. *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* (foll). (paras 11 & 16)

H **(3)** The applicant had failed to show that his application fell within the ambit of s. 44(1) of the SRA. It was clear that there was no point that required further investigation. There was no arguable case and the application thus was frivolous and I vexatious. (para 20)

Case(s) referred to:

Gasing Meridian Sdn Bhd v. Datuk Bandar Kuala Lumpur [2004] 1 CLJ 219 CA ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(foll)***

Ng Bee v. Chairman, Town Council, Kuala Pilah [1974] 1 LNS 104 HC ***(refd)***

R v. Secretary of State ex parte Swati [1986] 1 All ER 717 ***(refd)***

R v. Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107 ***(refd)***

Semantan Estate [1952] Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust v. VR Rudani [1989] SC 1607 ***(refd)***

State of Haryana v. Chanan Mal [1976] SC 1654 ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Thein Tham Sang v. The United States Army Medical Research Unit & Anor [1982] CLJ 500; [1982] CLJ (Rep) 820 HC ***(foll)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 9
Federal Constitution, art. 127
Judges' Code of Ethics 2009, ss. 12, 13(1), 14
Judges' Ethics Committee Act 2010, ss. 5, 9
Rules of the High Court 1980, O. 53 r. 1
Specific Relief Act 1950, s. 44(1)(a), (b)

Other source(s) referred to:

MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn, pp 652, 653

For the applicant - In person, Sangeet Kaur Deo; M/s Karpal Singh & Co

For the Attorney General - Tan Sri Datuk Panglima Abdul Gani Patail AG (Datin Azizah Nawawi, Dato' Kamaluddin Md Said & Suzana Atan SFCs with him); AG's Chambers

For the Bar Council (watching brief) - Lim Chee Wee (Kwan Will Sen with him)

Reported by Suresh Nathan

A

JUDGMENT

Aziah Ali J:

[1] This is an application for leave for judicial review under O. 53 of the Rules of the High Court 1980. The applicant is a B Member of Parliament for Bukit Gelugor and an advocate and solicitor. The respondent is the Chief Justice of Malaysia. By way of encl. 1 the applicant applies for the following reliefs:

(a) That leave be granted to the applicant for an order of C *mandamus* to issue against the respondent directing the respondent to respond to the request of the applicant *vide* letter dated 1 December 2010 by the applicant, that the respondent recuse himself from determining the merits of the complaint by the applicant against the respondent under s. 13 D of the Judges' Code of Ethics 2009 (P.U.(B) 201);

(b) Such further or consequential directions and orders as may be deemed fit and proper by the Honourable Court;

(c) Costs in the cause; and E

(d) Any further or other relief deemed fit and proper by the Honourable Court.

[2] The grounds for the application as found in the statement F are as follows:

(a) The respondent is the public authority required under s. 13(1) of the Judges' Code of Ethics 2009 to determine whether there is merit in any complaint against a judge of the High Court, Court of Appeal and the Federal Court. However, G pursuant to the doctrine of necessity the respondent cannot legally determine whether there are merits in the complaint against the respondent by the applicant made by the letter dated 20 August 2010.

H (b) Having regard to s. 5 of the Judges' Ethics Committee Act 2010, it would be proper for a retired Chief Justice, Malaysia or any retired Federal Court judge to determine the applicant's complaint against the respondent having regard to the adage, 'No one should be a judge in his own cause' – *'nemo debet esse* I *judex in propria causa'*.

(c) After the respondent failed to respond to the complaint of the applicant by letter dated 20 August 2010, the applicant sent the respondent another letter dated 1 December 2010 seeking the co-operation of the respondent to revert to him within seven days from receipt of that letter. However, there has been no response either from the respondent to this letter.

(d) The respondent, when acting under s. 13 of the Judges' Code of Ethics 2009, does not act in his judicial capacity, but in his capacity as a public authority required by law to act under s. 13 of the Judges' Code of Ethics 2009 to proceed and reply to a complaint made against any judge including the Chief Justice, Malaysia.

(e) As the respondent has failed and/or refused to respond to the applicant's letter dated 1 December 2010, the respondent has failed to carry out his duty and obligation under s. 13 of the Judges' Code of Ethics 2009 the prerequisite to which is to have responded to the applicant's letters dated 20 August 2010 and 1 December 2010.

(f) The applicant is, accordingly, entitled to the relief sought in para. (a), (b) and (c) of the application herein or in terms of any further or other relief being deemed fit and proper by the Honourable Court.

The Attorney General objected to the application. Having heard submissions, I allowed the objection by the Attorney General and dismissed the application for leave with costs agreed at RM10,000 to the Attorney General.

Background

[3] The applicant avers in his affidavit in support as follows:

(a) by letter dated 20 August 2010 addressed to the respondent, the applicant made a complaint against the respondent under s. 13 of the Judges' Code of Ethics 2009 ("the Code") with a view to an enquiry being held pursuant to s. 14 of the Code and s. 9 of the Judges' Ethics Committee Act 2010 ("the Act");

(b) despite the provisions of s. 13 of the Code, pursuant to the doctrine of necessity and having regard to the adage 'no man should be a judge in his own cause' *(nemo debet esse judex in propria causa)* the respondent could not determine the merits of the complaint against himself;

(c) it would therefore be proper, having regard to s. 5 of the Act that a retired Chief Justice, Malaysia or any retired Federal Court judge to determine the complaint;

(d) the office of the respondent acknowledged receipt of the letter dated 20 August 2010. However there was no response to the said letter;

(e) the applicant wrote another letter dated 1 December 2010 ("the second letter") requesting response to his letter dated 20 August 2010 and sought a response within seven days;

(f) the respondent's secretary acknowledged receipt of the letter. However there was no response to the second letter either.

[4] The applicant contends that under s. 13 of the Code, the respondent acts in his capacity as a public authority required by law to act under the said provision to process and reply to a complaint made against any judge including the Chief Justice, Malaysia. Section 13 of the Code provides as follows:

Procedure On Breach Of Code

12. Complaint against judge

Any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court.

13. Chief Justice to determine nature of breach of this Code

(1) Where a complaint is received under paragraph 12 and the Chief Justice is of the opinion that the complaint has no merit, he may dismiss it after consulting the President of the Court of Appeal if the judge complained of is a judge of the Court of Appeal, the Chief Judge of the High Court in Malaya if the judge complained of is a judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak if the judge complained of is a judge of the High Court in Sabah and Sarawak.

(2) If the Chief Justice is of the opinion that the breach does not warrant the judge be referred to a tribunal appointed under Clause (4) of Article 125 of the Federal Constitution, the Chief Justice may refer the matter to the Committee.

It is contended that by failing and/or refusing to respond to the second letter, the respondent has failed to carry out his duty and obligation under the said provision.

[5] The Attorney General objects to the application for leave. In his written submissions the Attorney General raises the following grounds:

(a) No Arguable Case, Frivolous And Vexatious

It is submitted that on the provisions of O. 53 r. 1 and s. 44 of the Specific Relief Act 1950 ("the SRA"), the applicant has failed to satisfy the threshold requirement for an order of *mandamus*. Order 53 r. 1 provides as follows:

Application For Judicial Review

Rule 1. Scope. (O. 53 r. 1)

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Section 44 of the SRA provides as follows:

44. Power to order public servants and others to do certain specific acts.

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

A (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

B (e) the remedy given by the order applied for will be complete.

The Attorney General submits that the applicant has failed to bring his case within the purview of s. 44 of the SRA as the applicant has failed to satisfy the requirements of s. 44(1). It is C submitted that the five conditions laid down in s. 44(1) are cumulative and must be fulfilled. In support the Attorney General cites the case of *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56 where Sharma J held as follows:

D Five conditions are laid down in s. 44 and these conditions are the five provisos contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled.

[6] The Attorney General further refers to the judgment of Ajaib Singh J (as he then was) in the case of *Ng Bee v. Chairman, Town* E *Council, Kuala Pilah* [1974] 1 LNS 104 wherein His Lordship said *inter alia* as follows:

Section 45 of the Specific Relief Act, 1950, sets out the procedure to be adopted in an application under s. 44(1) of the Act. The application must be founded on an affidavit of the person injured, F stating his right in the matter in question, his demand of justice and the denial thereof. The High Court's power to make an order compelling a public officer to perform his public duty is discretionary. Before the Court may consider exercising its discretion in favour of granting the order it must be satisfied that the applicant has a right to the performance of a duty under any G law by a person holding a public office. The Court must also be satisfied that all the conditions laid down in the proviso to s.44(1) of the Specific Relief Act are fulfilled ... under the sub-section the Court had to be satisfied further that (a) the applicants property, franchise or personal right would be injured if the respondent did H not apply to the magistrate for an order of demolition of her building; (b) that it was clearly incumbent on the respondent in his public character to apply for the order from the magistrate under a law for the time being in force, ...

I

[7] It is submitted that the applicant has failed to show that he falls within the ambit of proviso (a) of s. 44(1) in order to pass the threshold issue of *locus standi*. There is nothing in the applicant's affidavit to state unequivocally that he has a clear and specific legal right to the relief sought, and that his rights would be injured if the respondent does not perform his statutory duties. The Attorney General cites the case of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1982] CLJ 500; [1982] CLJ (Rep) 820 where Hashim Yeop Sani J (as he then was) said:

> Under proviso (a) of section 44(1), the applicant had to show his personal right would be injured if the order is not made by the court. Nowhere in the affidavit of the applicant here was it stated that he had such personal right or that the personal right would be injured if the order was not given.

The Attorney General further refers to the case of *Semantan Estate [1952] Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 wherein Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Supreme Court said as follows:

> Then there is the important question of the appellant's standing. He must have a specific legal right to ask the Court to exercise its discretion to issue the order of *mandamus*. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to *mandamus*.

[8] In the applicant's written submissions in reply, the applicant submits that he has the *locus standi* to bring this application against the respondent based on the phrase "any complaint" found in s. 12 of the Code which states as follows:

> Any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court.

The applicant submits that the phrase "any complaint" adverts to any citizen having the right to make a complaint against any judge, including the Chief Justice, who has contravened any provision of the Code to ensure a pristine judiciary. It is submitted that any citizen who finds a judge publicly misbehaving has a right to have him referred for disciplinary action. Therefore as a

Malaysian citizen the applicant says he has the *locus standi* to apply for action to be taken against the respondent for misconduct. The applicant further submits that as an advocate and solicitor and an officer of the court, he is duty bound to ensure a judge does not contravene the Code. The applicant concedes that the act of a judge does not affect his private rights but contends that his *locus standi* to bring an action against such a judge cannot be doubted. In reply the Attorney General reiterates his submissions that the applicant has failed to bring his case within the purview of s. 44(1) of the SRA and therefore has failed to pass the threshold issue of *locus standi.*

[9] Section 44(1) of the SRA empowers the court to make an order in the nature of *mandamus* against any person holding public office requiring him to do certain specific acts subject to the fulfilment of the five conditions set out therein. However "The application must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof … The court must be satisfied that all the conditions laid down in the proviso to s. 44(1) of the Specific Relief Act are fulfilled …" *(Ng Bee v. Chairman, Town Council, Kuala Pilah, supra)*. In *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235 the Court of Appeal said:

> An application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on ... It is in this affidavit too that the applicant must state the particular decision under attack. If the decision was arrived at not in accordance with law then the facts or illegality must be stated in the affidavit. *In a nutshell the supporting affidavit must be sufficiently complete to persuade the judge that the application before him was not frivolous and vexatious and that there was substance in the grounds to support the application.* (emphasis added)

The applicant herein must show in his affidavit in support of his application that his personal right would be injured by the alleged failure and/or refusal of the respondent to respond to his letter dated 1 December 2010. If the applicant fails to show that he has a legal right to the relief sought then he is not entitled to *mandamus (Semantan Estate [1952] Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan; Ng Bee v. Chairman, Town Council, Kuala Pilah, supra)*.

[10] I have perused the applicant's supporting affidavit in which the applicant avers that he is a Malaysian citizen and the Member of Parliament for Bukit Gelugor. The applicant contends that as a citizen and advocate and solicitor he has the *locus standi* to bring an action against a judge for misconduct as he is duty bound to ensure a judge does not contravene the Code. In my considered opinion the right to lodge a complaint under s. 12 of the Code and the right to obtain an order of *mandamus* as prayed for by the applicant ought to be distinguished. One is not synonymous with the other. To my mind although the applicant has a right as a citizen, a Member of Parliament and an advocate and solicitor to lodge a complaint under s. 12 of the Code, this alone does not *ipso facto* confer him with the *locus standi* to obtain the relief prayed for unless the applicant satisfies the requirements of s. 44(1). I agree with the Attorney General that insofar as the application for *mandamus* against the respondent is concerned, on the authority of *Koon Hoi Chow v. Pretam Singh (supra)*, the applicant must satisfy all of the five conditions under s. 44(1)(a).

[11] I find nowhere in the applicant's supporting affidavit has the applicant averred unequivocally that his personal right would be injured if the respondent does not perform his statutory duties *(Thien Tham Sang v. United States Army Medical Research Unit, supra)*. On the materials before me I agree with the Attorney General that the applicant has failed to satisfy the requirements of s. 44(1)(a) of the SRA. The application is therefore frivolous. On this ground alone this application for leave ought to be dismissed.

(b) Sections 12 And 13 Of The Code Do Not Impose A Legal Duty On The Respondent To Act In The Manner Dictated By The Applicant

[12] The Attorney General submits that under s. 44(1)(b) of the SRA, the applicant must show that the respondent has a legal duty under ss. 12 and 13 of the Code. The Attorney General cites the case of *Koon Hoi Chow v. Pretam Singh (supra)* wherein Sharma J said:

> Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. There must be under the law some duty cast upon the public officer. If he does not do the duty, then the court will call upon him to perform that duty.

A It is submitted that s. 12 of the Code confers power on the Chief Justice to receive any complaint against a judge alleged to have committed a breach of the provision of the Code. Section 13 empowers the Chief Justice to determine the complaint, coupled with the discretion of whether to dismiss the complaint, to refer
B the judge to a tribunal or to refer the matter to the Committee under s. 14 of the Code. It is submitted that the words "... the Chief Justice is of the opinion that the complaint has no merit, he may dismiss it ..." clearly indicates that it is an empowering provision coupled with the discretionary powers to act in any
C manner prescribed in s. 13 (*Gasing Meridian Sdn Bhd v. Datuk Bandar Kuala Lumpur* [2004] 1 CLJ 219). Therefore it is submitted that section 13 does not impose a duty on the Chief Justice to act in a manner dictated by the applicant.

D **[13]** The applicant submits that the respondent does not have the discretion to dismiss the applicant's demand made in his letter dated 20 August 2010 that a retired Chief Justice, Malaysia or any retired Federal Court Judge determine the merits of the applicant's complaint against the respondent having regard to the
E adage 'no one should be a judge in his own cause'. The applicant cites the case of *State of Haryana v. Chanan Mal* [1976] SC 1654 wherein it was held:

> Any petitioner who applies for a writ or order of *mandamus* in the nature of a *mandamus* should, in compliance with a well-
F known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established.

G The applicant submits that his letter sets out in detail the demand for the legal requirement to be fulfilled by the respondent. It is further submitted that these matters should not be considered at the leave stage and in support the applicant cites the case of *Shri*
H *Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust v. V.R. Rudani* [1989] SC 1607 as follows:

> *Mandamus* is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226.

I

[14] With respect I am unable to agree with the applicant that these matters should not be considered at the leave stage. The issue of compliance with s. 44(1) is not a technical issue. Section 44(1) goes to the issue of *locus standi*. The court must be satisfied that the applicant has a right to the performance of a duty under the law by the respondent.

[15] Mr. Lim Chee Wee, counsel holding watching brief for the Bar Council in his written submissions concedes that the Code does not provide for a method or manner in dealing with a situation where a complaint is made against the Chief Justice. Hence there is tacit admission that, as submitted by the Attorney General, ss. 12 and 13 of the Code do not impose a legal duty on the respondent to act in the manner dictated by the applicant that a retired Chief Justice or any retired Federal Court Judge determine the merits of his complaint. However it is submitted by Mr. Lim that premised on the rule of natural justice, the Chief Justice should not adjudicate on a complaint levelled against him. Counsel refers to s. 9 of the Courts of Judicature Act 1964 which deals with the exercise of the powers or the performance of the duties of the Chief Justice by the President of the Court of Appeal or the Chief Judge of the High Court in Malaya, as the case may be, whenever the Chief Justice is unable to exercise the powers or perform the duties of his office owing to illness, absence from Malaysia or any other cause, or in the event of a vacancy in the office. However it is submitted that it is preferable that an ex-Chief Justice considers the complaint.

[16] *Mandamus* can be granted only when a legal duty is imposed on an authority. In MP Jain '*Administrative Law of Malaysia and Singapore*' 3rd edn at pp. 652, 653 it is stated:

> The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law … *Mandamus* can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same; and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law.
>
> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, *mandamus* is not issued to compel him to exercise his power.

As correctly submitted by counsel holding watching brief for the Bar Council, the Code does not provide for a method or manner in dealing with a situation where a complaint is made against the Chief Justice. Likewise as submitted by the Attorney General, ss. 12 and 13 of the Code do not impose a legal duty on the respondent to act in the manner dictated by the applicant. Therefore in the absence of any legal duty that is imperative and not optional or discretionary in nature imposed upon the respondent under ss. 12 and 13 of the Code, I find that the applicant has failed to satisfy the condition under s. 44(1)(b) of the SRA. Thus this is further ground to dismiss the application for being frivolous.

[17] The Attorney General in reply submits that the alternative avenue for the applicant as a Member of Parliament is provided by art. 127 of the Federal Constitution which provides as follows:

> 127. The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter, of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

The Attorney General submits that there has been a breach of a duty of disclosure imposed upon the applicant when the applicant fails to disclose in his affidavit that the applicant has raised the same complaint against the respondent in Parliament twice on 9 November 2009 and 14 December 2009 (*Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627).

[18] Applications for leave for judicial review must be made *uberimae fide* for if leave is granted, the affidavit in support and the application will form the first basis of the applicant's case in the substantive application. There is a clear duty of disclosure the breach of which may, depending on the importance of the non-disclosure, result in the order for leave being set aside *(Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad, supra)*. I have taken into consideration the submissions by the Attorney General that art. 127 of the Federal Constitution affords the applicant an alternative avenue for his complaints and that the applicant has raised the same matter twice in Parliament. In *R. v. Secretary of State ex parte Swati* [1986] 1 All ER 717 Sir Donaldson MR said as follows:

... it is well established that, in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant.

Conclusion

[19] The guidelines to be followed by the court in considering an application for leave have been laid down in the case of *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 and approved by the Supreme Court in the case of *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd. (supra)* wherein Edgar Joseph Jr. SCJ in his judgment said:

In *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

(i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing.

The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[20] In *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor (supra)* the Court of Appeal said:

It will be pointless to grant leave, even if the appellant were to have sufficient interest over the matter, if it is crystal clear that its case is a hopeless one on its merits; or the appellant's case rests only on non-justiciable issues.

A Having considered the application I agree with the Attorney General that the applicant has failed to show that his application falls within the ambit of s. 44(1) of the SRA. It is clear that there is no point that requires further investigation. I am satisfied that there is no arguable case and the application is frivolous and
B vexatious. For the reasons stated above I allowed the objection by the Attorney General and dismissed the application for leave with costs agreed at RM10,000 to the Attorney General.

C

D

E

F

G

H

I